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In The

# Supreme Court of the United States

October Term, 1995

RICHARD LEE BAILEY, JOHN TUCKER GLOVER, and PEDRO BLAKE JANE,

*Petitioners,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI


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## QUESTION PRESENTED

Whether Petitioners may be criminally prosecuted for marijuana trafficking offenses after they have already been punished for their involvement in those offenses by having their property forfeited to the government in administrative proceedings.

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## OFFICIAL AND UNOFFICIAL REPORTS

The decision of the United States Court of Appeals for the Ninth Circuit was a memorandum decision, not for publication, filed on December 12, 1995. The Court's order denying the Petition for Rehearing and rejecting the suggestion for rehearing *en banc* was filed January 31, 1996. The District Court order was filed December 23, 1994. The decisions and orders are reproduced in the appendix. [Appendix 1-8].

## STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was filed on December 12, 1995. The order denying rehearing was filed January 31, 1996.

There have been no motions for extensions of time to file this Petition for Writ of Certiorari.

This Court has jurisdiction to review the question presented in this case by writ of certiorari pursuant to 28 U.S.C. § 1254.

## STATEMENT OF PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides, in pertinent part, as follows:

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . .

2. Title 19 U.S.C. §§ 1607(a), 1608, and 1609, which are reproduced in the appendix. [Appendix 9-11].

## STATEMENT OF THE CASE

Petitioners, Richard Lee Bailey, Pedro Blake Jane, and John Tucker Glover, were arrested in late February of 1994 for marijuana trafficking offenses. Law enforcement officials seized the vehicle Mr. Bailey was driving at the time of his arrest because it was discovered to contain marijuana. They also seized a vehicle, a scale, a handgun, and currency from Mr. Jane, and currency from Mr. Glover. On March 11, 1994, each Petitioner received notice that his property was the subject of forfeiture proceedings because of its involvement in the marijuana trafficking offenses. [Clerk's Record "C.R." 127, Exhibit 1, pp. 1-7; C.R. 131, Exhibit 1, pp. 1-6; C.R. 142, Exhibit 1, pp. 1-7]. On March 23, 1994, the Petitioners were indicted and charged with those marijuana trafficking offenses. [C.R. 27]. The Petitioners did not make any claims to the property in the administrative forfeiture proceedings.[1] On May 3, 1994, Mr. Glover's currency was forfeited. [Appendix 12-13]. On May 11, 1994, the property seized

[1] Petitioner Glover initially returned a document stating that he had no further interest in the seized currency, but later filed a handwritten petition with the Customs Service explaining that the currency belonged to him and requesting its return. After the Customs Service informed him that his petition was untimely and that he was required to file a claim and cost bond to contest the forfeiture, he took no further action. [C.R. 143, Exhibits 5 and 6].

from Mr. Bailey and Mr. Jane was forfeited. [Appendix 14-17].

On November 4, 1994, Petitioner Bailey filed a Motion to Dismiss for Violation of Protection Against Double Jeopardy, which was joined by Petitioners Jane and Glover. On December 22, 1994, the District Court issued its order denying the Motion to Dismiss. [Appendix 6, 7 and 8]. By Memorandum Opinion filed December 12, 1995, the United States Court of Appeals for the Ninth Circuit affirmed the District Court's order. [Appendix 1, 2 and 3]. On January 31, 1996, the Ninth Circuit Court of Appeals issued its order denying rehearing. [Appendix 4 and 5].

The District Court had jurisdiction over the underlying criminal prosecution pursuant to 18 U.S.C. § 3231. The District Court's pretrial order denying Petitioners' claim of former jeopardy was final for the purposes of 28 U.S.C. § 1291 and immediately appealable. U.S. Const., Amend. V; *Richardson v. United States*, 468 U.S. 317, 322 (1984); *Abney v. United States*, 431 U.S. 651 (1977). Petitioners now seek review of the Ninth Circuit Court of Appeals' decision by Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254.

The facts relating to the seizure of Petitioners' property and the manner in which the vehicles were titled and registered have not been disputed by the government, either in the proceedings before the District Court or on appeal. Furthermore, the government did not dispute that the forfeitures were based on the same criminal

offenses alleged in the indictment.[2] The only question presented in this case is, then, the effect of Petitioners' failure to contest the administrative forfeitures.

## REASONS FOR GRANTING THE WRIT

Pursuant to Rule 10(c) of the Rules of the Supreme Court of the United States, Petitioners seek a writ of certiorari because important questions of federal law should be settled by this Court relating to the efforts individuals must make in order to show that they have been punished by the forfeiture of their property to the government. This Court should also grant certiorari because the Ninth Circuit Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court. The Ninth Circuit's focus on whether a particular individual contests a particular forfeiture action conflicts with the "categorical" approach set forth in *Austin v. United States*, ___ U.S. ___, 113 S.Ct. 2801 (1993) and *Department of Revenue of Montana v. Kurth Ranch*, ___ U.S. ___, 114 S.Ct. 1937 (1994) which focuses on

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[2] *See United States v. Richard Lee Bailey, John Tucker Glover and Pedro Jane*, (9th Cir.), Case No. 95-10023, 4, 5, Brief of Appellee, filed May 26, 1995, p. 4 ["The factual basis for the administrative forfeiture is the fact that the truck was used to transport 800 pounds of marijuana on February 26, 1994"]. Before the District Court, the government argued generically that civil forfeiture proceedings always have different "elements" than offenses involved in criminal prosecutions, but the government did not argue that the forfeitures were not based on the same criminal offenses charged in the indictment. [C.R. 133; Appellants' Joint Excerpts of Record "E.R." 7].

the features and purposes of the statutes employed by the government.

### A. The Ninth Circuit Court of Appeals' Determination That Property Owners Are Not Punished When They Do Not Contest The Forfeiture Of Their Property To The Government Conflicts With Relevant Decisions From This Court Which Focus The Analysis Of Punishment On The Features And Purposes Of The Statutes Employed As A Whole.

In *Austin v. United States*, ___ U.S. ___, 113 S.Ct. 2801 (1993), the United States Supreme Court adopted a categorical approach and examined the forfeiture statutes before it "as a whole" to determine whether they imposed punishment, rather than focusing on whether " 'the sanction as applied in the individual case serves the goals of punishment.' " *Id.* at 2812 n. 14, quoting *United States v. Halper*, 490 U.S. 435, 448 (1989). In *United States v. $405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994), the Ninth Circuit panel noted that the Supreme Court "adopted a categorical approach to 'punishment' determinations in the forfeiture context . . . ," which focuses on the nature and the purposes of the statute under consideration, rather than its application in any particular case. 33 F.3d at 1220.

> the *Austin* Court explicitly refused to apply such a case-by-case approach to determining whether a forfeiture constitutes "punishment." *See Austin*, 113 S.Ct. at 2812 n. 14. Rather, largely because "forfeiture statutes historically have been understood as serving not simply remedial

> goals but also those of punishment and deterrence," *id.*, the Court held that any determination of whether those forfeitures constitute "punishment" must look to the requirements of the forfeiture *statute* as a whole.

*Id.*

The Supreme Court reaffirmed this approach in *Department of Revenue of Montana v. Kurth Ranch*, ___ U.S. ___, 114 S.Ct. 1937 (1994). The Court focused on the features and purposes of a Montana drug tax and determined that proceedings for its enforcement after criminal punishment had been imposed violated the Double Jeopardy Clause. 114 S.Ct. at 1948.[3] As the Ninth Circuit noted in amending the *$405,089.23* opinion upon denial of rehearing:

> Our adoption of this categorical approach is also compelled by the Supreme Court's recent decision in *Department of Revenue of Montana v. Kurth Ranch*, 114 S.Ct. 1937 (1994). There, the Supreme Court applied *Austin*'s categorical approach for determining when punishment has been imposed in a Double Jeopardy case arising pursuant to a state statute that taxed drug monies. *Id.* at 1948.

56 F.3d 41 (9th Cir. 1995). Appellants submit that the Ninth Circuit has erroneously abandoned the categorical

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[3] Taken as a whole, this drug tax is a concoction of anomalies, too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purposes of the double jeopardy analysis.

*Kurth Ranch*, 114 S.Ct. at 1948 [footnote omitted].

approach by focusing on whether a particular individual does or does not contest the forfeiture of his property after the government seizes it.

The better reasoned opinions have recognized the proper focus of the punishment determination in double jeopardy cases. The focus should remain on the features and purposes of the statutes employed by the government. After examining Supreme Court precedent in *Halper, Austin,* and *Kurth Ranch,* Judge Sarokin succinctly stated:

> The issue should be whether defendant was the owner, not whether he filed a proper and timely claim of ownership in the forfeiture proceeding. He is punished if his property is forfeited, irrespective of whether or not he participated. Hence, there should be no distinction between administrative and civil forfeitures; in either instance, a defendant must establish ownership and punishment before he can claim double jeopardy.

*United States v. Baird,* 63 F.3d 1213, 1224-25 (3rd Cir. 1995) *cert. denied* ___ U.S. ___, 116 S.Ct. 909 (1996) [Sarokin, J., dissenting]. The recent decisions of other courts on this issue also properly retain the focus on the nature and purpose of the forfeiture statutes and the government's actions.

In *United States v. Brophil,* 899 F.Supp. 1257 (D.Vt. 1995), the District Court conducted a thoughtful analysis of the United States Supreme Court's recent determinations of when an ostensibly civil sanction constitutes

"punishment." The Court acknowledged that it had formerly held that failure to appear in the forfeiture proceeding precluded any double jeopardy claim, relying upon the opinion of the Seventh Circuit in *United States v. Torres*, 28 F.3d 1463 (7th Cir. 1994). However, after a "thorough examination of the analytical bases" of the *Torres* opinion against the background of recent Supreme Court punishment cases, the Court concluded:

> The Supreme Court's holdings in these decisions suggest a particular analysis for multiple punishment cases that examines the nature of the government's action against the accused to determine the applicability of the Double Jeopardy Clause. By neglecting this approach and instead focusing on the character of the underlying proceeding, the *Torres* Court overlooked the teachings of cases such as *Halper*, *Austin*, and *Kurth Ranch*.

899 F.Supp. at 1263.

The Court found that is was a mistake to:

> analyze[ ] the nature of the forfeiture proceeding rather than the character of the sanctions that the forfeiture imposed. This analytical flaw may serve to explain how the *Torres* Court reached a decision that seems to defy common sense: that the government's seizure of $60,000 from Torres did not punish him simply because he did not appear as a party at the forfeiture proceeding.

*Id.* at 1264.[4]

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[4] *See also United States v. Aguilar*, 886 F.Supp. 740 (E.D.Wash. 1994), in which the court declined to follow *Torres* because it conflicted with the categorical approach set forth by

In *Gainer v. United States*, 904 F.Supp. 1234 (D.Kan. 1995), the Court conducted a similar analysis and was persuaded that a categorical approach must be employed in determining the effect of a failure to contest an administrative forfeiture.

> The character of the act of forfeiture is without question punishment whether or not a defendant appears as part of the proceeding. This is especially true when there is no doubt about the owner of the property seized. *See United States v. Ailemen*, 893 F.Supp. 888 (D.N.Cal. 1995); *Brophil*, 889 F.Supp. at 1268.
>
> * * *
>
> The Court is persuaded that the character of the act, monetary loss through forfeiture, not the defendant's participation or lack of participation in the proceeding, is the critical factor in determining whether a prior punishment has occurred.

*Id.* at 1237.[5]

In the present case, there is no dispute about the ownership of the property. Petitioners are the titled and registered owners of the property which was taken either from their personal possession or from their places of

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the Ninth Circuit in *$405,089.23*. "The Ninth Circuit in *$405,089.23* states that double jeopardy analysis depends on the nature of the forfeiture statute, not its particular employment." *Id.* at 743 n.3.

[5] The court noted that, "[t]he case before this Court is one for which there can be no doubt to whom the confiscated property belonged. Mr. Gainer is listed as the owner of the truck." 904 F.Supp. at 1237.

residence. [Appendix 12-17]. The government did not provide notice to any other possible interest holders, and, not surprisingly, there were no other claimants to the property. [Appendix 12-17].

Petitioners submit that the reasoning of these cases persuasively demonstrates that the determination of whether the government has imposed punishment should be made by focusing on the character of the government's action, and the features and purposes of the mechanisms it employs. This approach is not only better suited to the, "'humane interests' safeguarded by the Double Jeopardy Clause's proscription of multiple punishments" (*Halper*, 490 U.S. at 447, *citations omitted*), but also comports with the firmly established principle that the protections of the Bill of Rights are not to be interpreted in a technical or cramped fashion.[6]

Magistrate Brazil clearly had these cherished principles in mind in considering the uncontested forfeiture in *United States v. (Pius) Ailemen*:

> As a matter of hard historical fact, the government already has punished [Ailemen]. It has taken his money under statutes that [*$405,089.23*] deems vehicles for punishment. It would ignore reality completely to insist as a

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[6] There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesmen; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied.

*Ex parte Lange*, 85 U.S. (18 Wall) 163, 178 (1873).

> matter of theory that he could not have been punished simply because he declined, out of fear for his constitutional right not to incriminate himself, to formally appear in the forfeiture proceeding. I strongly suspect that the framers of the Double Jeopardy Clause were much more concerned about the realities of punishment than about the forms of proceedings.

*Ailemen*, 893 F.Supp. 888, 899 (N.D.Cal. 1995).

It ignores practical realities to contend that individuals have not been punished by the forfeiture of their property to the government simply because they fail to contest the government's actions. To be sure, property owners have a choice when the government seizes their property. But often it is a Hobson's choice. Most often it is simply a determination that the game is not worth the candle. This Court should retain the focus of the categorical approach on the nature of the government's actions when it imposes the sanction of forfeiture. The Court should not attempt to draw distinctions between those who forfeit their property to the government by failing to contest forfeiture, and those who forfeit their property by stipulating to it. *See United States v. Perez*, 70 F.3d 345 (5th Cir. 1995); *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995); *United States v. McCaslin*, 863 F.Supp. 1299 (W.D. Wash. 1994).

Petitioners submit that there is no principled basis for distinguishing between administrative and judicial forfeitures because the features and purposes of the forfeiture statutes, and the government's purpose in employing the forfeiture mechanism, are identical in both instances. Whether an individual will subsequently file a

claim is simply a fortuity that the government cannot know when it seizes property for forfeiture.[7] The Ninth Circuit therefore erred by focusing on this case-by-case fortuity rather than the government's purposes when it seizes property and employs the forfeiture statutes.

> in determining whether a particular civil sanction constitutes criminal punishment, it is the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated.

*United States v. Brophil*, 889 F.Supp. 1257, 1264 (D.Vt. 1995) [quoting *Halper*, 490 U.S. at 447 n. 7].

### B. This Court Should Settle Important Questions Of Federal Law Concerning The Efforts Property Owners Must Make In Order To Show That They Have Been Punished By The Forfeiture Of Their Property To The Government.

Petitioners submit that the abandonment of the categorical approach to the punishment determination has resulted in wide confusion in the case law. The abandonment of the categorical approach has now raised a lot of nice questions about what sort of opposition to the

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[7] *Cf. Austin*, ___ U.S. at ___, 113 S.Ct. at 2812 n. 14 ["The value of the conveyances and real property forfeitable . . . can vary so dramatically that any relationship between the Government's actual costs and the amount of the sanction is merely coincidental"].

government's efforts to take property will suffice.[8] This Court should grant certiorari in order to settle the questions that have resulted from the use of flawed analysis and inapplicable analogies.

For example, in addressing the issue of uncontested administrative forfeitures, the Ninth Circuit has drawn upon an analogy to "abandoned" property. In *United States v. Cretacci*, 62 F.3d 307 (9th Cir. 1995), the panel held that an individual who failed to contest the administrative forfeiture of his property was not punished for the purposes of the Double Jeopardy Clause.

> In light of the fact that the statute requires the government to notify potential owners of its intention to forfeit seized property, and the fact that, under the statute, if no claim of ownership is asserted, the government is permitted to sell

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[8] *Compare United States v. Sanchez-Cobarruvias*, 65 F.3d 781 (9th Cir. 1995) [suggesting that Petition for Remission or Mitigation would bar subsequent criminal prosecution, however, no final disposition of forfeiture proceedings], *with United States v. Unger*, 898 F.Supp. 740 (D.Or. 1995) [holding that petition for remission is not the equivalent of a claim and that jeopardy does not attach in administrative proceedings involving only a Petition for Remission or Mitigation of forfeiture]. *Compare also United States v. Muth*, 896 F.Supp. 196 (D.Or. 1995) [filing of claim but not cost bond, and no further action after Government denied request to proceed in *forma* pauperis] *and Jones v. United States*, 900 F.Supp 238 (E.D.Mo. 1995) [same], *with United States v. Perez*, 70 F.3d 345 (5th Cir. 1995) ["Stipulation of Settlement" and "Agreed Order of Forfeiture and Dismissal"]; *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995) [Settlement and Consent Judgment]; *and United States v. McCaslin*, 863 F.Supp. 1299 (W.D.Wash. 1994) [Consent Judgment].

> the unclaimed property as if it had been "abandoned to the United States," we conclude that an owner who receives notice of the intended forfeiture and fails to claim an ownership interest in the property has effectively abandoned it.

62 F.3d at 310.

Other courts have specifically noted the flaw in this analogy. "Abandonment in the strict property right sense is to be distinguished from abandonment in search and seizure cases where the issue is merely whether the individual has relinquished his interest in the property so that he could no longer retain an expectation of privacy with regard to it at the time of the search." *Katsaris v. United States*, 684 F.2d 758, 761 (11th Cir. 1982). Reliance upon these flawed analogies lead courts to conclusions that "defy common sense." *Brophil*, 889 F.Supp. at 1264. In the present case, it is certainly far-fetched to contend that the Petitioners "abandoned" the property that was seized from them at gunpoint at the time of their arrests.

The central question should focus on the particular rights an individual "abandons" in cases involving abandoned property. In the Fourth Amendment context, an individual abandons his expectation of privacy in discarded items police officers later find. In forfeiture cases, an individual who fails to contest the government's action abandons the constitutional guarantee that he or she will not be deprived of property without due process of law. The individual certainly does not abandon the right to assert the "hard historical fact" of deprivation when the government tries to extract punishment a second time. *Ailemen*, 893 F.Supp. at 899.

The departure from the categorical approach to the determination of punishment has led courts to make similar mistakes by making an analogy to the notion of jeopardy "attaching" during a criminal prosecution. Unless and until courts determine that ostensibly civil forfeiture proceedings are the equivalent of criminal prosecutions, Petitioners submit that the concept of being placed "in jeopardy" has no place in the analysis. The question is simply whether punishment has, in fact, been meted out.

Therefore, analogies to stages in criminal prosecutions in which a defendant "avoids an adjudication of his or her guilt or innocence" are misplaced. *See e.g. United States v. Scott*, 437 U.S. 82, 100 (1978); *Ricketts v. Adamson*, 483 U.S. 1 (1987). In criminal prosecutions, an individual who avoids an adjudication of guilt thereby avoids the imposition of punishment that would have accompanied that adjudication. The converse is true in uncontested forfeiture actions. An individual who avoids an "adjudication of guilt" assures that the punishment that would have accompanied that finding will, in fact, be imposed.

Petitioners readily concede that in some uncontested forfeiture proceedings there will be questions about who truly owns the property and who is truly punished by its forfeiture to the government. Petitioners also concede that a defendant raising a claim of double jeopardy has the burden of proving that he or she was, in fact, punished by the government's previous action.

However, it is error to contend that these matters must be addressed in the forfeiture proceedings themselves, or not at all. There is no reason why these matters cannot be addressed at the hearing on a defendant's

double jeopardy motion in his criminal case. Judge Sarokin expressly noted this point in his dissent in *United States v. Baird*, stating, "I believe that, if a defendant can prove that he was the owner of the property seized, participation in the forfeiture proceeding is not and should not be a precondition to a claim of double jeopardy." 63 F.3d at 1224 [Sarokin, J., dissenting].

Maintaining the focus of the punishment determination on the nature and purpose of the government's statutes and actions, in adherence with the categorical approach set forth in *Austin* and *Kurth Ranch*, would avoid these questions and allow for uniformity of application of the law in forfeiture cases. There is no principled basis for distinguishing between those who file a claim in a forfeiture proceeding and then stipulate to its forfeiture (*see United States v. Perez*, 70 F.3d 345 (5th Cir. 1995); *United States v. Ursery*, 59 F.3d 1568 (6th Cir. 1995)), and those who do not file the required claim and cost bond. The features of the forfeiture statutes and the government's purpose in employing them is the same in either case, and the final result is the same in either case – forfeiture of property to the government because of the owner's involvement with criminal offenses. Maintaining the categorical approach in determining whether the government has punished someone for a criminal offense comports with common sense, practical realities, and the long-standing principle that constitutional protections are not to be interpreted in a narrow or technical manner.

## CONCLUSION

For the foregoing reasons, Petitioners respectfully submit that the Court should grant a writ of certiorari to review the decisions and orders of the United States Court of Appeals for the Ninth Circuit and United States District Court below.

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff - Appellee,<br>v.<br>RICHARD LEE BAILEY<br>Defendant - Appellant. | No. 95-10023<br>D.C. No. CR-94-00144-03-WDB |
| UNITED STATES OF AMERICA,<br>Plaintiff - Appellee,<br>v.<br>JOHN TUCKER GLOVER,<br>Defendant - Appellant. | No. 95-10024<br>D.C. No. CR-94-00144-02-WDB |
| UNITED STATES OF AMERICA,<br>Plaintiff - Appellee,<br>v.<br>PEDRO BLAKE JANE,<br>Defendant - Appellant. | No. 95-10025<br>D.C. No. CR-94-00144-01-WDB<br><br>MEMORANDUM* |

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the District of Arizona
William D. Browning, District Judge, Presiding

Submitted November 29, 1995**
San Francisco, California

(Filed Dec. 12, 1995)

Before: GOODWIN and HAWKINS, Circuit Judges, and FITZGERALD***, District Judge.

The sole question presented in this appeal is whether the district court erred in denying appellants' motion to dismiss their indictment based on a violation of the Double Jeopardy Clause of the United States Constitution. This court has held that a criminal prosecution following an administrative forfeiture of unclaimed property does not violate the Double Jeopardy Clause. *See United States v. Cretacci*, 62 F.3d 307 (9th Cir. 1995).

The parties do not dispute that the property at issue – two Ford pickup trucks, an electronic scale, a handgun and ammunition, and $2,231 in U.S. currency – was seized and administratively forfeited in May 1994, in connection with the drug trafficking offenses charged against appellants. It is also undisputed that appellants

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** In a court order filed September 20, 1995, the panel unanimously found this case suitable for decision without oral argument and ordered it submitted on October 17, 1995. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4. Subsequently, the court filed an order on October 4, 1995, granting appellants' emergency motion to defer submission of case pending final resolution of related case: *United States v. Cretacci*.

*** Honorable James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

received adequate notice of the forfeiture of their property and failed to file a claim of ownership for any of the property.

We find that this case is controlled by *Cretacci*. By failing to file a claim in the civil forfeiture proceeding, appellants effectively abandoned any interest in the forfeited property. "Just as the seizure of abandoned property cannot be said to implicate the former owner's privacy rights . . . the forfeiture of abandoned property cannot be said to implicate the former owner's double jeopardy rights." *Cretacci*, 62 F.3d at 310-11. Accordingly, the uncontested administrative forfeiture of property did not serve to punish appellants and, therefore, the pending criminal prosecution cannot constitute double jeopardy.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| UNITED STATES OF AMERICA,<br>Plaintiff - Appellee,<br>v.<br>RICHARD LEE BAILEY<br>Defendant - Appellant. | No. 95-10023<br>D.C. No. CR-94-00144-03-WDB (District of Arizona) |
| UNITED STATES OF AMERICA,<br>Plaintiff - Appellee,<br>v.<br>JOHN TUCKER GLOVER,<br>Defendant - Appellant. | No. 95-10024<br>D.C. No. CR-94-00144-02-WDB |
| UNITED STATES OF AMERICA,<br>Plaintiff - Appellee,<br>v.<br>PEDRO BLAKE JANE,<br>Defendant - Appellant. | No. 95-10025<br>D.C. No. CR-94-00144-01-WDB<br>ORDER |

(Filed Jan. 31, 1996)

Before: GOODWIN and HAWKINS, Circuit Judges, and FITZGERALD*, District Judge.

* Honorable James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

(CRIMINAL ORDER - GENERAL)

(Filed Dec. 23, 1994)

CR No. CR 94-144-TUC-WDB Date: December 22, 1994

Title U.S.A. v. JANE, GLOVER & BAILEY

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**HONORABLE WILLIAM D. BROWNING**

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Each of the Defendants in this action has filed a Motion to Dismiss based upon violation of the Fifth Amendment of the United States Constitution insofar as it prevents successive prosecution for the same conduct.

United States Custom's Service seized certain property which the Defendants now claim was owned by them. Each Defendant was notified that the Government intended to, by administrative proceedings, forfeit the property unless they made a claim of ownership to the property in which case that case would be adjudicated in a civil forfeiture action.

None of the three defendants made a timely claim to the property and, accordingly, the property was forfeited to the Government by administrative action inasmuch as such forfeiture was uncontested (Deft. Glover timely indicated he had no interest in the property of which he was notified – currency – and later, after the expiration of the statutory period, made a claim to the property. Because it was untimely, it was denied and Mr. Glover

did not seek any further action to recover the property.) The Defendants' Motion relies heavily upon the case of *United States v. $405,089.23 U.S. Currency,* 33 F.3d 1210 (9th Cir.1994). In the above cited case the defendants in the criminal action made claims in the parallel and successive civil forfeiture action and both were adjudicated. Each was adjudicated by a different United States District Judge.

The Government's response claims that the civil proceedings and the criminal proceedings do not involve the same conduct and proof of the same elements in order to sustain judgment for the Government in each case, hence they are not violative of the double jeopardy clause. The Government further claims that because, in this case, none of the Defendants made a claim to the property resulting in a proceeding where they were placed in jeopardy, the case of *United States v. $405,089.23* is inapplicable.

The Court is persuaded by the latter argument which is supported by the well reasoned case of *United States v. Torres,* 28 F.3d 1463 (7th Cir.1994). That case squarely holds that one who does not make a claim in the forfeiture proceeding thereby precludes a finding that he or she owned or had any protected interest in the forfeited property. His failure to become a party in the civil forfeiture proceeding resulted in his not having been placed in jeopardy.

IT IS ORDERED that the Motion is DENIED on the basis of the foregoing and because of this ruling, the COURT FINDS it unnecessary to reach the argument that the two proceedings involved dissimilar conduct and

proof of different elements to sustain a verdict on behalf of the government.

Dated this 22nd day of December, 1994.

/s/ William D. Browning
WILLIAM D. BROWNING
U. S. DISTRICT COURT
JUDGE

**19 U.S.C. § 1607. Seizure; value $500,000 or less**

**(a) Prohibited articles; transporting conveyances**

If –

(1) the value of such seized vessel, vehicle, aircraft, merchandise, or baggage does not exceed $500,000;

(2) such seized merchandise is merchandise the importation of which is prohibited;

(3) such seized vessel, vehicle, or aircraft was used to import, export, transport, or store any controlled substance; or

(4) such seized merchandise is any monetary instrument within the meaning of section 5312(a)(3) of Title 31;

the appropriate customs officer shall cause a notice of the seizure of such articles and the intention to forfeit and sell or otherwise dispose of the same according to law to be published for at least three successive weeks in such manner as the Secretary of the Treasury may direct. Written notice of seizure together with information on the applicable procedures shall be sent to each party who appears to have an interest in the seized article.

* * *

**19 U.S.C. § 1608. Seizure; claims; judicial condemnation**

Any person claiming such vessel, vehicle, aircraft, merchandise, or baggage may at any time within twenty days from the date of the first publication of the notice of seizure file with the appropriate customs officer a claim stating his interest therein. Upon the filing of such claim,

and the giving of a bond to the United States in the penal sum of $5,000 or 10 percent of the value of the claimed property, whichever is lower, but not less than $150, with sureties to be approved by such customs officer, conditioned that in case of condemnation of the articles so claimed the obligor shall pay all the costs and expenses of the proceedings to obtain such condemnation, such customs officer shall transmit such claim and bond, with a duplicate list and description of the articles seized, to the United States attorney for the district in which seizure was made, who shall proceed to a condemnation of the merchandise or other property in the manner prescribed by law.

**19 U.S.C. § 1609. Seizure; summary forfeiture and sale**

**(a) In general**

If no such claim is filed or bond given within the twenty days hereinbefore specified, the appropriate customs officer shall declare the vessel vehicle, aircraft, merchandise, or baggage forfeited, and shall sell the same at public auction in the same manner as merchandise abandoned to the United States is sold or otherwise dispose of the same according to law, and shall deposit the proceeds of sale, after deducting the expenses described in section 1613 of this title, into the Customs Forfeiture Fund.

**(b) Effect**

A declaration of forfeiture under this section shall have the same force and effect as a final decree and order

of forfeiture in a judicial forfeiture proceeding in a district court of the United States. Title shall be deemed to vest in the United States free and clear of any liens or encumbrances (except for first preferred ship mortgages pursuant to section 961 of Title 46, Appendix or any corresponding revision, consolidation, and enactment of such subsection in Title 46) from the date of the act for which the forfeiture was incurred. Officials of the various States, insular possessions, territories, and commonwealths of the United States shall, upon application of the appropriate customs officer accompanied by a certified copy of the declaration of forfeiture, remove any recorded liens or encumbrances which apply to such property and issue or reissue the necessary certificates of title, registration certificates, or similar documents to the United States or to any transferee of the United States.

**Exhibit 2**

AFFIDAVIT

1. I, Carmen Dominguez, am the paralegal assigned to handle the administrative forfeiture process for the $1,132.00, seizure number 94-2609-00067.

2. The $1,132 seized under the above noted case number was forfeited at the close of business on May 3, 1994. Notice of Seizure and Intent to Forfeit was posted at the Tucson International Airport for 20 consecutive days as required by law on April 13, 1994.

3. Claimant filed a petition with Customs on April 19, 1994. Claimant was informed the petition was not timely filed, that he had the right to contest the forfeiture by posting the required cost bond by May 3, 1994.

4. The Right to Petition, Notice of Seizure and Intent to Forfeit were forwarded by me to Mr. John Tucker Glover, claimant, to the following address:

4A Cleveland Road
Salem, MA 01970

5. No one filed claim or required cost bond, including Mr. Glover.

Further affiant sayeth not.

/s/ Carmen Dominguez
CARMEN DOMINGUEZ
Paralegal Specialist
U.S. Customs Service

Subscribed and sworn to before me this 22nd day of November, 1994.

/s/ Esther I. Bustamante
Notary Public

My Commission Expires:

My Commission Expires
July 7, 1997

**Exhibit A**

AFFIDAVIT

1. I, Carmen Dominguez, am the paralegal assigned to handle the administrative forfeiture process for the 1992 Ford Pickup, seizure number CN94-2609-00068.

2. The 1992 Ford Pickup, seized under the above noted case number was forfeited at the close of business on May 11, 1994. Notice of Seizure and Intent to Forfeit was published in the Arizona Daily Star, Tucson, Arizona, for 3 consecutive weeks, as required by law, on April 20, April 27, and May 4, 1994.

3. The Right to Petition, Notice of Seizure and Intent to Forfeit were forwarded by me to Richard Bailey, registered owner, to the following two addresses:

| | |
|---|---|
| 3912 W. Beryl | 1964 Jackson Street |
| Phoenix, Arizona 85051 | Ogden, Utah |

4. No one filed a claim to this vehicle including Richard Bailey.

Further affiant sayeth not.

/s/ Carmen Dominguez
CARMEN DOMINGUEZ
Paralegal Specialist
U.S. Customs Service

Subscribed and sworn to before me this 10th day of November, 1994.

/s/ Patricia Torres
Notary Public

My Commission Expires:

My Commission Expires January 3, 1998

**Exhibit 1**

AFFIDAVIT

1. I, Carmen Dominguez, am the paralegal assigned to handle the administrative forfeiture process for $1,099.00 in U.S. Currency, one 1988 Ford Pickup Truck, VIN 1FTHX26G7JKA25854, one Ohaus Electric Scale, S/N 41088, one 9MM Witness Semi-Auto Handgun, and 25 rounds of ammunition, under seizure number CN94-2609-00069.

2. The items seized under the above noted case number were forfeited at the close of business on May 11, 1994. Notice of Seizure and Intent to Forfeit was published in the Arizona Daily Star, Tucson, Arizona, for 3 consecutive weeks, as required by law, on April 20, April 27, and May 4, 1994.

3. The Right to Petition, Notice of Seizure and Intent to Forfeit were forwarded by me to Pedro Jane, registered owner, to the following two addresses:

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|---|---|
| 800 W. Schuman Street | 441 E. Garnet |
| Tucson, Arizona 85701 | Mesa, Arizona 85204 |

4. No one filed a claim to this vehicle including Pedro Jane.

Further affiant sayeth not.

/s/ Carmen Dominguez
CARMEN DOMINGUEZ
Paralegal Specialist
U.S. Customs Service

Subscribed and sworn to before me this 14th day of November, 1994.

/s/ Esther J. Bustamante
Notary Public

My Commission Expires:

My Commission Expires
July 7, 1997